For General Release







Use of EEP Nutrient Offset and Riparian Buffer Mitigation In-Lieu Fee Programs by Developers to Meet Elective Local Government Requirements

The North Carolina Division of Water Quality and the Ecosystem Enhancement Program (EEP) have received questions about the possible use of two existing EEP In-Lieu Fee (ILF) programs to satisfy nutrient or buffer requirements electively imposed by local governments. The purpose of this document is to provide clarifying information and guidance on this issue.

QUESTION: Where stormwater nutrient control or buffer requirements are electively being implemented by local governments and not specified by State rules or legislation, is EEP authorized to accept payment from developers seeking to satisfy those requirements?

GUIDANCE: It depends on whether state rules or laws authorize local governments to make such payments. North Carolina statutes and rules provide the foundation for the establishment and operation of EEP's Nutrient Offset and Riparian Buffer Mitigation ILF programs. Only local ordinances founded on those state regulations may utilize these specific EEP programs as a nutrient offset or buffer mitigation option. Key state rules and statutes are:

- NC General Statute 143-214.21 that creates the Riparian Buffer Restoration Fund to receive fees paid to the Department to offset increased nutrient loadings and mitigate buffer impacts from development subject to these stormwater and buffer regulations.
- Session Law 2009-337 that specifies that nutrient offset credits may be purchased to offset nutrient loadings to surface waters as required by the Environmental Management Commission (EMC).
- Rule 15A NCAC 02B .0240 that provides procedures and lists watershed-specific rules allowing for nutrient offset payment to EEP in fulfillment of nutrient reduction requirements.
- Buffer rules under 15A NCAC 02B for the Neuse Basin (.0242), Tar-Pamlico Basin (.0260), Catawba Basin (.0244), Jordan Watershed (.0268), Randleman Watershed (.0252), and Goose Creek Watershed (0609).

The Department has identified two scenarios where the elective requirements of local governments are authorized under state rule or law allowing developers to access these two EEP ILF programs and five scenarios where access is not authorized. The guidance set out in this document should aid determinations on other scenarios that arise.

<u>Scenarios where EEP **IS**</u> authorized to accept payments from developers into the Nutrient Offset ILF Program

Scenario 1 – Local governments listed in a nutrient strategy's new and existing development stormwater rules independently enacting nutrient control requirements on development prior to receiving EMC-approval of their new development program.

The EEP Nutrient Offset ILF Program is authorized to accept payments from developers for both phosphorus and nitrogen under the Falls Existing Development Rule, 15A NCAC 02B .0278(4)(h) and Jordan Session Law 2009-

216. The Division of Water Quality (DWQ) will recognize local governments' nutrient control requirements on development not subject to their EMC-approved new development program as measures towards meeting load reduction requirements for existing development. This includes control measures on development permitted both prior to implementation of their EMC-approved programs, scheduled for July and August 2012 in Falls and Jordan respectively, and subsequent to implementation of those programs but vested under a local government's previous requirements.

Scenario 2 – Local governments listed in a nutrient strategy's new development stormwater rule implementing requirements in addition to or more stringent than those of the State on State-regulated nutrients.

The EEP Nutrient Offset ILF Program is authorized to accept payments from these developers based on the structure of new development rules in nutrient strategy basins. Those rules allow listed local governments to adopt nutrient requirements on a regulated nutrient that exceed those found in rule. This rule structure authorizes use of EEP to meet the more stringent requirements.

<u>Scenarios where EEP **IS NOT** authorized to accept payments into the Nutrient Offset ILF Program or the Riparian Buffer Mitigation ILF Program from developers under current rules</u>

Scenario 3 – Local governments not listed in a State nutrient strategy's new development stormwater rule

The municipality cannot use the EEP Nutrient Offset ILF Program to fulfill their elective stormwater requirements until designated by the EMC through rulemaking as subject to this rule. Currently some local governments in the Neuse and Tar-Pamlico River Basins are not subject to this rule in their respective basins. Both rules provide designation criteria that would require rule amendment by the EMC.

Scenario 4 – Local governments listed in a nutrient strategy new development stormwater rule requiring control of a nutrient not covered in that rule (e.g., requirements controlling stormwater phosphorus where phosphorus is not addressed in that rule).

The EEP Nutrient Offset ILF Program is not authorized to accept payment for a nutrient not addressed in rule. The EMC would need to amend the rule to regulate that nutrient, or the EMC or General Assembly would need to adopt other, similar regulation to authorize such payments into that program.

Scenario 5- In watersheds lacking state riparian buffer regulation, local governments requiring buffer mitigation. Since these buffers are not part of a State protected buffer program, the applicant cannot use the EEP Riparian Buffer Mitigation ILF Program to fulfill their buffer mitigation requirement.

Scenario 6 - EMC-approved local government buffer programs imposing protections that are additional to requirements of the State.

The applicant cannot use the EEP Riparian Buffer Mitigation ILF Program to fulfill buffer mitigation requirements for impacts outside the areas protected by state buffer rules. This includes impacts beyond the 50-foot riparian buffer in the Neuse, Tar-Pamlico, Jordan, Randleman or Catawba basins or beyond the 100 or 200-foot buffers in the Goose Creek watershed.

Scenario 7 – In areas with state buffer protection rules, non-EMC approved local government programs that implement requirements additional to those of the state.

The applicant cannot use the EEP Riparian Buffer Mitigation ILF Program to fulfill buffer mitigation requirements for these additional local regulations since such protections are not authorized under EMC rules.

SCOPE - Guidance in this document is consistent with SL 2011-398, Part 1, Section 1 in that it clarifies that the existing authorities of two existing EEP programs, specifically, the EEP Nutrient Offset ILF Program and the EEP Riparian Buffer Mitigation ILF Program, to receive payments are based in State rules and statutes, not local

ordinances. It does not seek to change or expand the authorities of these programs or the EMC rules governing buffers and nutrient offsets.

As with existing local stormwater programs implementing EMC nutrient rules, newly designated local programs would be subject to the requirements of <u>Session Law 2009-337</u> and <u>SL 2011-343</u>. This includes the requirement for nongovernmental entities as defined in SL 2011-343 (i.e., non-state and federal entities) to first seek buffer or nutrient offset credit from an approved private bank if one is available prior to seeking payment to EEP.

CONTACTS: For additional questions regarding this information, EEP and DWQ contacts are provided below:

DWQ Topic	DWQ Contact
For information on seeking designation in the EMC's rules governing nutrient controls on post-construction stormwater:	Mike Herrmann, Tar-Pam Coordinator 919-807-6442 michael.herrmann@ncdenr,gov
Information on approved private mitigation banks for the nutrient offset program can be found at: portal.ncdenr.org/web/wq/swp/ws/401/certsandpermits/mitigation	Katie Merritt, Nutrient Banking Coordinator 919-807-6371 Katie.merritt@ncdenr.gov
Information on riparian buffers can be found at: http://portal.ncdenr.org/web/wq/swp/ws/401/riparianbuffers	Amy Chapman, Riparian Buffer Coordinator 919-807-6400 Amy.Chapman@ncdenr.gov
EEP Topic	EEP Contact
For accessing EEP's mitigation programs: http://portal.ncdenr.org/web/eep/in-lieu-fee-programs	Kelly Williams, In-Lieu Fee Coordinator 919-716-1921 Kelly.williams@ncdenr.gov